

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF REVENUE

In the Matter of the Proposed Exempt Rules of the Minnesota Department of Revenue Governing Sales and Use Tax, Request for Review and Approval of Good Cause Exempt Rules Under Minnesota Statutes.

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. §§ 14.386
AND 14.388**

On July 17, 2006, the Minnesota Department of Revenue (Department) filed documents with the Office of Administrative Hearings (OAH) seeking review and approval of the above-entitled rules under Minn. Stat. §§ 14.386 and 14.388.

Based upon a review of the written submissions by the Department and the public comments in this matter, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The following rules or parts thereof as set out in the Memorandum, are not approved:

Minn. R. 8130.0110, 8130.1000 subp. 1, 8130.1000, subp. 2 C, Minn. R. 8130.1800, subp. 1, 8130.2500, subp. 3, 8130.5600, subp. 2, 8130.6700, subp. 2.

2. All other rules and repeal of rules are approved.

Dated this 31th day of July, 2006.

/S/
RICHARD C. LUIS
Administrative Law Judge

NOTICE

Minn. Rule pt. 1400.2400, subp. 4a provides that when a rule is disapproved the agency must resubmit the rule to the administrative law judge for review after changing it. The judge then has five working days to review and approve or disapprove the rule. Minn. Rule pt. 1400.2400, subp. 5 provides that an agency may ask the Chief Administrative Law Judge to review a rule that has been disapproved by a judge. The request must be made within five working days of receiving the judge's decision. The Chief Judge must then review the agency's filing, and approve or disapprove the rule within 14 days of receiving it.

MEMORANDUM

Applicable Law

Minn. Stat. § 14.388 provides an abbreviated rulemaking procedure where an agency can show good cause for use of that provision. In this case the Department has specified that because the specific changes either incorporate specific changes set forth in applicable statutes or the changes do not alter the sense, meaning or effect of the rule, good cause has been shown. Section 14.388 provides that the agency must satisfy the requirements of Minn. Stat. § 14.386(a) subd. 1, (1)-(4) in order to adopt a rule.

The statute further provides that the Revisor of Statutes must approve the form of the rule, the agency head must adopt the rule, the Office of Administrative Hearings must approve the rule as to its legality and the rule must be published in the State Register. Specifically excluded from review by OAH is whether or not the agency has shown the rule to be needed and reasonable, a criteria that must be met in a typical chapter 14 rulemaking.¹

The legality determination by OAH is governed by Minn. R. 1400.2400, subp. 3, which states that in reviewing a filing the judge must decide whether the rule meets the standards of Minn. R. 1400.2100, Items A and D to G. Those standards of review provide as follows:

A rule must be disapproved by the judge or chief judge if the rule:

- A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

¹ Minn. Stat. § 14.388, subd.1. (Unless otherwise specified, all references to Minnesota Statutes are to the 2004 edition, and all references to Minnesota Rules are to the 2005 edition.)

. . .

- D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;
- E. is unconstitutional or illegal;
- F. improperly delegates the agency's powers to another agency, person or group;
- G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law. . . .

Minn. Stat. § 14.388, subd. 2 provides that interested parties have five business days after the date of the Notice of Adoption to submit comments to the Office of Administrative Hearings. That comment period ended on July 24, 2006 at 4:30 p.m. OAH received no comments concerning this rule.

Use of the Good Cause Exemption

Normally, to proceed under Minn. Stat. § 14.388, an agency must show that the usual chapter 14 rulemaking process is unnecessary or impractical and must show that the proposed rules fit within one of four very narrow categories set out in the statute. The Department asserts that it meets the requirements for use of the good cause exemption procedure under either the third or fourth clauses of the statute.

The third clause permits an agency to use the statutory good cause exemption if the rule changes proposed by the agency "(3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required..." The fourth clause permits an agency to utilize the good cause exemption of the rule changes to "(4) make changes that do not alter the sense, meaning, or effect of a rule..."²

The Department's reasons for using the good cause exemption are described as follows:

Minnesota Rules, chapter 8130, is no longer consistent with the Minnesota statutes because of statutory amendments (see Findings). Since the statutory authority for the indicated parts or subparts of the rules has been repealed or amended, making a portion of the rules obsolete, no interpretation of the

² Minn. Stat. § 144.388, subd. 1, (3) & (4).

law is required in amending that portion. Also, certain parts or subparts are deleted or amended because they are not consistent or conflict with court cases, other rules, or they are obsolete simply due to the passage of time (see Findings). Finally, references to specific forms and to line numbers on forms, and references to detailed administrative processes can be removed or made more generic. By taking this approach, the rules will not have to be amended in the future merely because a form or a process changes but the basic interpretation of the statute remains the same.

Furthermore, because the additional changes made to the rule are of a minor, editorial nature, or remove redundant language (see Findings) and do not have any substantive effect, those changes do not alter the sense, meaning or effect of Chapter 8130.³

Minn. Stat. § 14.388, subd. 1 directs the OAH to determine whether adequate justification has been provided for use of the good cause process.

Notice to the Public

Minn. Stat. § 14.388, subd. 2 requires that an “agency proposing to adopt, amend, or repeal a rule under this section must give electronic notice of its intent in accordance with section 16E.07, subdivision 3, and notice by United States mail or electronic mail to persons who have registered their names with the agency under section 14.14, subdivision 1a. The notice must be given no later than the date the agency submits the proposed rule to the Office of Administrative Hearings for review of its legality and must include: (1) the proposed rule, amendment or repeal; (2) an explanation of why the rule meets the requirements of the good cause exemption under subdivision 1; and (3) a statement that interested parties have five business days after the date of the notice to submit comments to the Office of Administrative Hearings.”

The Proposed Order Adopting Amendments of Rules states that “All procedural requirements in Minnesota Statutes, section 14.388: and Minnesota Rules, part 1400.2400: and other applicable law have been complied with.” The letter to OAH states that the Department will post the Notice of Intent to Adopt Permanent Rules on the Department’s website and mailed the Notice to persons who have registered with the Department under Minn. Stat. § 14.14, subd. 1a. On this record, the ALJ concludes that the notice requirements for these rules were met.

³ Proposed Order Adopting Amendment of Rules, Statement of Supporting Reasons.

Overview of the Proposed Rules

The Department has reviewed Minnesota Rules Governing Sales Tax, Minn. R. 8130, and has proposed to amend some rules and repeal others.

The rules proposed for amendment using the Good Cause Exemption process are:

Minnesota Rules, Parts 8130.0110, subparts 1 and 2; 8130.0200, subparts 1 and 4; 8130.0400, subparts 1, 4, 6, 7 and 10; 8130.0500, subpart 1; 8130.0600, subpart 1; 8130.0700; 8130.0900, subparts 1, 2, 3, 4 and 5; 8130.1000; 8130.1100, subparts 1, 3, 4, 5 and 6; 8130.1200, subparts 1, 3 and 4; 8130.1500; 8130.1800; 8130.1900; 8130.2300; 8130.2500; 8130.3100; 8130.3200, subpart 1; 8130.3300; 8130.3400, subparts 6 and 7; 8130.3500; 8130.3800; 8130.3900; 8130.4000, subparts 3 and 4; 8130.4300, subpart 1; 8130.4400, subpart 1; 8130.5550; 8130.5600, subparts 2 and 4; 8130.6000; 8130.6200, subparts 1, 1a, 5, 7, 8, 9, 10 and 11; 8130.6300; 8130.6400, subparts 1 and 3; 8130.6600, subpart 2; 8130.6700, subparts 1 and 2; 8130.7400, subpart 1; 8130.7900, subpart 1; 8130.9250, subparts 4 and 11; 8130.9300, subpart 1; 8130.9600.

The rules proposed for repeal using the Good Cause Exemption process are:

Minnesota Rules, Parts 8130.0120; 8130.0300; 8130.0900, subpart 8; 8130.3600; 8130.4000, subpart 5; 8130.4200; 8130.4300, subpart 2; 8130.5600, subpart 1; 8130.5900; 8130.6500; 8130.6600, subpart 1; 8130.6700, subpart 3; 8130.6900; 8130.7300; 8130.7500, subparts 1, 2 and 4; 8130.7600; 8130.7700; 8130.7900, subparts 2 and 3; 8130.8400.

The Department's Findings and Statement of Supporting Reasons justifying use of the statutory good cause exemption from rulemaking provisions include 40 individual Findings. Many of the Findings are based upon statutory changes to the sales tax laws that have occurred since 1978.

This Memorandum only discusses, for reasons described below, those proposed rules that are disapproved.

Proposed Amendments to Minn. R. 8130.0110, Minn. R. 8130.1800, subp. 1 and Minn. R. 8130.2500, subp. 3. Use of the term "sales at retail."

The Department proposes to amend Minn. R. 8130.0110. Finding No. 2 reads:

Part 8130.0110.

Subpart 1 should be rewritten to clearly state the application of Chapter 8130, so that the phrase “Sales and Use Tax Law” does not have to be constantly and unnecessarily repeated throughout the chapter.

The proposed rule would delete the existing second sentence in subpart 1, which reads:

Terms not specifically defined in the Sales and Use Tax Law or this chapter will be given the meanings ascribed to them in accordance with legal, accounting, business, or common usage.

The amendment adds the following sentence:

Unless otherwise specifically noted, this chapter is limited to interpreting the sale and use tax laws in Minnesota Statutes, chapter 297A, and laws related to the administration of sales and use tax laws.

The Department’s Finding does not indicate that its proposed change to subpart 1 is necessitated by any change in statute. The proposed change must not alter the sense, meaning, or effect of the rule in order to come within the Good Cause Exemption. While the elimination of the first sentence does not alter the meaning of subpart 1, the elimination of the existing second sentence does alter the sense and meaning of subpart 1. Parties have frequently cited general accounting principles in support of their arguments supporting a particular interpretation of the sales tax laws.⁴ The proposed language could be interpreted as altering the ability to use the range of authorities allowed now to interpret the meaning of sales tax laws and rules. The proposal makes a change that alters the sense, meaning and effect of the current rule within the meaning of Minn. Stat. § 14.388, subd. 1(4). For these reasons, the change to Minn. R. 8130.0110, subp. 1 does not fall within the Good Cause Exemption and is not approved. In order to correct this defect the Department should confine the revision of subpart 1 to striking the first sentence, leaving the second sentence and adding the new sentence.

⁴ See *NorAm Energy Corp. v. Commissioner of Revenue*, 1997 Minn. Tax LEXIS 58 (Minn. T.C. 1997); *Great Lakes Gas v. Commissioner of Revenue*, 2000 Minn. Tax LEXIS 30 (Minn. T.C. 2000).

The Department also proposes to change Minn. R. 8130.0110, subp. 2. The relevant Finding reads:

Subpart 2 contains a definition which is duplicative of another rule, and should be replaced by a cross reference to that rule. Also, the word “regular” in this subpart needs to be changed to “normal” to conform to the definition of normal course of business in *Minnesota Statutes*, section 297A.61, subdivision 21.

The proposed amendment to subpart 2 does more than change the word “regular” to “normal.” The amendment to subpart 2, with underlined text and strikeouts, reads as follows:

Subp. 2. Sales. Certain transactions defined in the ~~Sales and Use Tax Law~~ and this chapter constitute sales. All sales of tangible personal property are deemed to be retail sales ~~or sales at retail~~ unless made to purchasers who intend to resell the property to others in the regular normal course of business as defined in Minnesota Statutes, section 297A.61, subdivision 21. The tax required to be collected by sellers on behalf of the commissioner is based upon the gross receipts from sales not specifically exempt. “Gross receipts” means ~~the total amount received for all sales at retail as measured by the sales price as defined in this chapter~~ are defined in part 8130.1800.

The Finding does not state why the definition of “gross receipts” is being changed. There is no indication that this change incorporates a specific change in statute. To be exempt, a rule change must not alter the sense or meaning of the rule. The new text changes the definition of “gross receipts” to include a cross-reference to Minn. R. 8130.1800, which defines “gross receipts” as involving “sales at retail.” In other Findings, the Department discusses the statutory definition for “retail sales” made in Laws 2001, First Special Session, chapter 5, article 12, section 9.⁵

Although the legislature has defined the term “retail sales”, the Department has retained the term “sales at retail” in two other rules that are included in the proposed amendments to the sales tax rules. These are Minn. R. 8130.1800, subp. 1 and 8130.2500, subp. 3.

⁵ See Finding No. 11 and Finding 14., which states in part “Subpart 1, the second sentence should be deleted because of the new definition of “retail sale” in Laws 2001, First Special Session chapter 5, article 12, section 9.”

Proposed Minn. R. 8130.1800, subp. 1, with the changes indicated, reads:

Subpart 1. Gross receipts. The sales tax is imposed upon the gross receipts from sales at retail. "Gross receipts" are herein defined in Minnesota Statutes, section 297A.61, subdivision 8, as the total amount received, in money or otherwise by barter or exchange, for all sales at retail (see Minnesota Statutes, section ~~297A.01~~ 297A.61, subdivision 4) as measured by the sales price. (See Minnesota Statutes, section ~~297A.01~~ 297A.61, subdivision 8 7.)

Proposed Minn. R. 8130.2500, subp. 3, with the changes indicated, reads:

Subp. 3. Multiple locations. ~~Where~~ If a person who is required to secure a permit has more than one place of business and the activities conducted at each place are subject to tax under the Sales and Use Tax Law, and the person elects to file a separate return for each place of business, a separate application must be filed for each business location. A permit ~~will be issued which may be used only at the address indicated on the permit~~ places designated. A separate permit ~~will be assigned to each place of business.~~ Members of a group of corporations related by stock ownership, ~~where~~ if the members are engaged in making sales at retail, must make individual applications.

In 2001 the legislature defined "retail sales" to include sales, rental and lease transactions.⁶ Because the legislature has defined "retail sales" to include rental and lease transactions, the term may not have the same sense, meaning or effect as the term "sales at retail" which is still incorporated in Minn. R. 8130.0110, subp. 2 because of the cross-reference to Minn. R. 8130.1800.

While the Department has deleted references to "sales at retail" and replaced it with "retail sales" in some proposed rules, it has left the term "sales at retail" in a number of the rules.⁷

If the Department intends that the proposed Sales Tax rules should incorporate specific changes in applicable statutes, the continued reference to

⁶ Subd. 4. (as amended by Laws 2001, First Special Session, chapter 5, article 12, section 9) reads: RETAIL SALE. (a) A "retail sale" means any sale, lease, or rental for any purpose other than resale, sublease, or subrent.

⁷ Compare 8130.1200, subp. 3 A, 8130.1800, subp. 1 and 8130.2500, subp. 3. Referring to "sales at retail" *with* 8130.1900 subp. 1 and 8120.1200 subp. 4. (retail sales).

“sales at retail” in some rules but not others does not consistently reflect the statutory change. The change of the phrase in some rules but not other rules may create a different sense, meaning or effect than currently exists in the rules. In order to correct this defect, the Department should consistently use the phrase “retail sales” instead of “sales at retail” through parts of Minn. R. 8130 it is proposing to change.

Minn. R. 8130.1000, subp. 2 C. Use of term “telephone service.”

In Finding 30 the Department notes that the legislature changed the term “telephone services” to “telecommunication services.” The term “telephone services” is retained, however, in the proposed amendment to Minn. R. 8130.1000, subp. 2 C, which reads:

- C. A person engaged in the furnishing of taxable lodging facilities, in determining the amount of consideration received subject to the tax, shall ~~exclude—therefrom~~ include separately stated charges for telephone service, ~~but shall include as taxable consideration,~~ and amounts received for the use of a television set or other items of tangible personal property.

In light of the use of the term “telecommunication services” in other parts, the continued use of the term “telephone services” in parts of the Sales Tax Rules is inconsistent.⁸ In order to correct this defect the Department needs to consistently use the phrase “telecommunications services” throughout the Sales Tax Rules unless it intends that communication services other than telephone services be treated differently for sales tax purposes.

Minn. R. 8130.1000 subp. 1, Finding No. 9.

The Department proposes to amend Minn. R. 8130.1000, subp. 1, to delete the last sentence.

⁸ Minn. Stat. § 297A.61, subd. 24 refers to “telecommunications services” provided to hotel guests.

a) "Telecommunications services" means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, by or through any electronic, satellite, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission, conveyance, or routing.

(b) Telecommunications services includes the furnishing for consideration of access to telephone services by a hotel to its guests.

Subpart 1. General rule. Under Minnesota Statutes, section 297A.01 297A.61, subdivision 3, paragraph (e) (g), clause (2), furnishing for a consideration of lodging and related services by a hotel, rooming house, ~~tourist court~~ resort, campground, motel, or trailer camp and the granting of any similar license to use real property other than the renting or leasing thereof of it for a period of 30 days or more constitute a sale. ~~See part 8130.0800, subpart 6, for rules exempting lodging furnished in connection with educational programs and children's camps.~~

The Department states that the last sentence is being eliminated because “(s)ubpart 1 also contains a reference to a rule which the Department of revenue is proposing to have repealed, and therefore the reference should be stricken.”⁹ Minn. R. 8130.0800, subp. 6 is not included in the list of rules being amended or repealed in the rulemaking process.¹⁰ The Department cannot delete the reference to Minn. R. 8130.0800, subp. 6 using the Good Cause Exemption process. In order to correct this defect the Department will need to withdraw the proposed strike of the last sentence of Minn. R. 8130.1000, subp. 1.

Minn. R. 8130.5600, subp. 2 and 8130.6700, subp. 2. Minnesota Tax Court case, *Tellus Consultants, Inc.*

The proposed amendment to Minn. R. 8130.5600, subp. 2 adds the following language:

For purposes of this subpart, the phrase “written, printed, or contained on electronic media” includes publications on computer disks, CD-Roms, floppy disks, audio tapes, or in any other form or media, as well as paper.

The proposed amendment to Minn. R. 8130.6700, subp. 2 similarly would expand the definition of “textbook” to include material printed on paper or contained on a computer disk, CD-Rom, floppy disk, audio tape, or other media.

In Findings 28 and 34, the Department justifies changes to Minn. R. 8130.5600, subp. 2 and Minn. R. 8130.6700, subp. 2 as necessary to conform to the decision of the Minnesota Tax Court in *Tellus Consultants, Inc.*, Minn. Tax Ct. Dkt. No. 6890 (Sept. 30, 1998). In *Tellus*, the Tax Court held that the term “publication” as used in Minn. Stat. § 297A.25, subd 10. included all types of media, not just material printed on paper.

⁹ Finding No. 9.

¹⁰ Proposed Order Adopting Amendment of Rules.

The Department only relies upon paragraphs 3 and 4 of Minn. Stat. §14.388, subd. 1 in support of its use of the statutory Good Cause Exemption.¹¹ Neither of these provisions authorizes a change to rules based on a court decision. Paragraph 3 authorizes amendments to rules that reflect specific changes in statutory language. Paragraph 3 does not authorize changes to rules based upon a court's interpretation of a statute. Paragraph 4 of the Good Cause Exemption authorizes changes that do not alter the sense, meaning, or effect of a rule. The existing rule defines the word "publication" to encompass only written or printed matter.¹² *Tellus* rejected this narrow definition. The proposed amendments, which adopt *Tellus*, would alter the sense, meaning or effect of the rules, and are beyond the type of changes authorized by Paragraph 4. Furthermore, Tax Court Decisions are not "court orders" that require exemption from the normal rulemaking procedure within the meaning of Minn. Stat. § 14.388, subd. 1 (2). In order to correct this defect the Department will need to remove any changes to proposed rules based upon court decisions.

Minn. R. 8130.1800 subp. 2 and 8130.9250, subp. 11. Use of the term "vendor."

In Finding 24, the Department notes that the term "vendor" is no longer used in Minn. Stat. § 297A. Accordingly, the Department proposes to change the term "vendor" to "retailer" in several rules.¹³ The term "vendor" however remains in several rules that are otherwise proposed for amendment. In light of the Department express intention to use the substitute the term "retailer" for "vendor," its continued usage in Minn. R. 8130.1800, subp. 2 and 8130.9250, subp. 11 could cause a careful reader of the rules to conclude that the absence of the change in these rules indicated a difference in sense or meaning. In order to correct this defect the Department should consistently change the term "vendor" to "retailer" throughout the amended sales tax rules.

Minn. R. 8130.5600, subp 2. "Qualified" and "legal" publications.

In Finding No. 28, the Department notes that the legislature changed the term "legal" publication to "qualified" publication. The proposed rule however retains a reference to "legal" newspaper in the last sentence of the fourth paragraph of subpart 2. If the Department wishes to substitute the word "qualified" for "legal" it should do so consistently throughout the rules. The Department can correct this defect by consistently using the term "qualified."

R. C. L.

¹¹ Proposed Order Adopting Amendment to Rules, Statement of Supporting Reasons.

¹² Minn. R. 8130.5600, subp. 2.

¹³ Minn. R. 8130.4000, subp. 3, 8130.1900